

**James (Migration) [2020] AATA 2194 (26 January 2020)**

**DECISION RECORD**

**DIVISION:** Migration & Refugee Division

**APPLICANT:** Mr Robert James

**CASE NUMBER:** 1810446

**DIBP REFERENCE(S):** CLF2014/34114

**MEMBER:** Grant Chapman

**DATE:** 26 January 2020

**PLACE OF DECISION:** Adelaide

**DECISION:** The Tribunal remits the application for a Partner (Residence) (Class BS) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 801 (Partner) visa:

- cl.801.221 of Schedule 2 to the Regulations

Statement made on 26 January 2020 at 10:44pm

**CATCHWORDS**

*MIGRATION – Partner (Residence) (Class BS) visa – Subclass 801 (Partner) – genuine and continuing relationship – no information provided to department – department attempted contact by mail, email and telephone – changes of address – on phoning and visiting department, applicant told to update contact details online – computer illiteracy – original application submitted on paper – validly married in home country – financial, household and social aspects of relationship – nature of commitment – decision under review remitted*

**LEGISLATION**

*Migration Act 1958 (Cth), ss 5F, 65, 362A*  
*Migration Regulations 1994 (Cth), Schedule 2, cl 801.221*

## **STATEMENT OF DECISION AND REASONS**

### **APPLICATION FOR REVIEW**

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 23 March 2018 to refuse to grant the applicant a Partner (Residence) (Class BS) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant, Robert James, applied for the visa on 26 February 2014 on the basis of his relationship with his sponsor, Danielle James. At that time, Class BS contained only one subclass: Subclass 801 (Partner). The criteria for the grant of this visa are set out in Part 801 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the applicant did not satisfy cl.801.221(1) because he did not satisfy any of the subclauses (2), (2A), (3), (4), (5), (6) or (8) because no information had been provided to demonstrate that the applicant continued to be the spouse of the sponsor, subsequent to the granting of the Subclass 820 visa.
4. The applicant appeared before the Tribunal on 1 October 2019 to give evidence and present arguments. The Tribunal also received oral evidence from his sponsor; from Beverley Dowker, the step-grandmother of the sponsor; while Mirrin James, the daughter of the applicant and sponsor and Kevin Dowker, the grandfather of the sponsor also attended the Hearing.
5. The applicant was represented in relation to the review by his registered migration agent, Patrick Forwood, from No Borders Migration Advocates, of Wayville, South Australia. The representative attended the Tribunal Hearing.
6. Prior and subsequent to the Tribunal Hearing, the applicant and sponsor provided substantial documentation which had not been provided to the Department of Immigration and Border Protection. As described in paragraph 3 above it was the absence of any documentation that had resulted in the Departmental delegate refusing the Subclass 801 visa.
7. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

### **8. CONSIDERATION OF CLAIMS AND EVIDENCE**

9. The issue in the present case is whether the applicant and his sponsor are in a genuine, continuing spousal relationship.
10. In determining the applicant's claims, the Tribunal must first make findings of fact on material matters in dispute. This may involve an assessment of credibility and in so doing, the Tribunal is aware of the need and importance of sensitivity to the circumstances and difficulties applicants may face before the Tribunal, related to their particular situation.
11. The applicant relies on written submissions and supporting documentary evidence provided to the Tribunal in relation to the review and previously to the Department, in relation to the original Subclass 820 visa application, together with oral evidence which the applicant, sponsor and other witnesses gave at the Tribunal Hearing.

12. The Tribunal found that the oral evidence was consistent with the documentary evidence and was credible and persuasive, given without hesitation or obfuscation.

13. **Background**

14. The applicant lodged a valid application for a Partner (Temporary) (Class UK) (Subclass 820) visa and Partner (Residence) (Class BS) (Subclass 801) visa on 26 February 2014. The Subclass 820 visa was granted on 18 December 2014 but the Subclass 801 visa was refused on 23 March 2018.
15. The Departmental delegate's Decision Record says that on 24 December 2015, the requisite two years after the granting of the applicant's Subclass 820 visa, an initial request for further information relevant to assessing the Subclass 801 application stage, was sent to the authorised contact address of the applicant but no response was received. An officer of the Department wrote to the applicant on 10 July 2017, by registered mail to the applicant's authorised postal address, to obtain the required information but this letter was returned to the Department on 10 August 2017 with the reason that the applicant had left the address. The delegate's Decision Record further says that on 11 January 2018 the applicant telephoned the Department to confirm whether the residential address had been updated and was advised that it had not been and that the applicant needed to submit a 'Change of Address Form 929.' The applicant provided a new email address during this telephone call. On 19 February 2018 and 15 March 2018, an officer of the Department attempted to contact the applicant on the mobile telephone number provided to the Department but received an automated message 'not accepting incoming calls.' A call, also on 15 March 2018, to the number provided by the sponsor failed because the number had been disconnected. The Decision Record said that, at the time of the Decision being written, the applicant had not responded to letters or email or provided the requested information and that there was no evidence of any change of address or that the applicant had made any further contact with the Department. The delegate's decision was made in the absence of the requested information.
16. Instructed by the applicant in relation to the above facts, his agent responded with a written submission to the Tribunal, dated 30 September 2019, containing information provided by the applicant, as paraphrased in this and the succeeding paragraphs under this subheading: The responding submission said that the applicant presented at the agent's Adelaide office on 12 April 2018 for a free consultation with the understanding that his Australian visa had been "cancelled." He was unaware of his exact Australian visa status at this time, as he had only learnt that there was an issue with his visa due to the recent event of his Medicare expiring and Medicare had informed him that he needed to contact the Department of Home Affairs, when they had been unable to renew his card after conducting the necessary checks, which included a visa status check.
17. The applicant had tried to speak to the Department of Home Affairs since attending Medicare but they had not been able to tell him anything over the telephone and had referred him to the Department website to learn what he had to do in his current circumstances.
18. Updating the Department other than by telephone had been a particular challenge for the applicant over the previous few years and is, essentially, the reason his Subclass 801 visa was refused and why the application was being appealed to the Tribunal.
19. A Visa Entitlement Verification Online (VEVO) check was done by the agent, with the applicant's consent on 12 April 2018 and it was learnt quickly that he was holding a Bridging Visa A (BVA) valid until 20 April 2018.

20. Further immediate checking with the Department at this time confirmed that the applicant was on a BVA due to the Department's decision made on 23 March 2018 to refuse him the grant of a Subclass 801 Permanent Partner visa, entirely due to the fact that he had failed to provide any evidence of his continuing relationship with his sponsor and wife, Mrs. Danielle Leigh James, or other valid claims that would have facilitated further assessment by the Departmental delegate processing his visa application.
21. As described in paragraph 13 above, the Department had made attempts to contact the applicant since 24 December 2015. However, it appears that contact was never made in a meaningful way whereby the applicant was made aware that the Department was in the process of seeking further information to assess him for grant of a Permanent Partner visa.
22. The initial Department request that is shown, in Departmental records (obtained under Section 362A of the Migration Act), to have been sent by post to a residential street number in Tasos Drive, Munno Para West, SA, 5115 on 24 December 2015, was never received.
23. Departmental file records show that the next attempt to send such a request by post to the same address occurred on 10 July 2017. The applicant has provided evidence that confirms he had moved from this address in July 2016.
24. The applicant made several continuing attempts to contact the Department by telephone to update his contact details, following relocation from the Tasos Drive address to the couple's current address, being a residential street number in Gores Road, Davoren Park, SA, 5113.
25. It appears that these efforts are not all documented in the Departmental file, which the applicant and agent understand to be the result of the applicant having been given generic advice on these occasions when he contacted the Department as to how to update his contact details online or via forms that, he was advised, could be downloaded from the Department website.
26. The agent submits that the claim by the applicant that he made several attempts to update the Department as to his current contact details that are not reflected on the Departmental file records are reasonable because of the fact that his Department file was not accessed at the time of his contact. The applicant has provided some detail of his efforts to contact and update his details with the Department in his signed Statutory Declaration, dated 26 September 2019, which states the following (the paragraph numbers, after the lettered subparagraph numbers of this paragraph 24, being the paragraph numbers of the Statutory Declaration): (a) 13. In around July 2016 I found a new address for us to live, (a residential street number is then given) Gores Road, Davoren Park, SA, 5113; (b) 14. Not long after we got the new address, I called the DOHA to update them. I was told I had to use a certain form online to update the address and to lodge that form online. I had lodged my original Partner Visa application on paper forms so I was not able to do an online update. I asked the DOHA to please send me the right forms to my new address. They told me that I had to use the online forms. (c) 15. In September 2016 I went into the DOHA in Adelaide to sort out the updating of our address. I spoke to the person at the counter and they got me to call someone else at the DOHA on an internal phone. I think it was a call centre. I explained I wanted to update my address and was again told I had to do this online with a certain form. Again, I asked if they could please send me the forms as I was having a lot of difficulty trying to do what they asked using the DOHA website. (d) 16. The DOHA informed me that they had recorded a new address. I confirm that I did not receive an email to our address at Gores Road. (e) 17 and 18. The submission then refers to the applicant's issues arising from his attempts to renew his Medicare card and the subsequent advice from his agent regarding the 10 July 2017 letter from the Department, described in paragraph 13 above. (f) 19. The applicant continues: This is confusing as I had several times made the DOHA aware that I was no longer living at this address since July 2016. (g) 20. On 11 January 2018 the

applicant rang DOHA to get confirmation as to whether his residential address had been updated and was advised that it had not. He was advised that he needed to submit a 'Change of Address Form 929.' During this exchange he did not provide a new email address, and confirmed that he had not used the email address described in this paragraph for several years. (h) 21 and 22. These two paragraphs describe the Department's attempts to contact the applicant in February/March 2018, as related to him by the agent and described in paragraph 13 above. (i) 23. The applicant says that he is now aware that his 801 visa application was refused on 23 March 2018 due to DOHA not having received any information to allow them to assess his second stage Partner visa application. (j) 24. The applicant was unaware the Department was trying to send him requests for further information. (k) 25. The applicant knew that DOHA would try to contact him at some point to ask for information to grant his permanent visa, this is the reason he tried many times to call them to get them to update his residential address, so he didn't miss out on that mail. (l) 26. The applicant found out that his visa had been refused in around April 2018 because his Medicare card had expired again. (m) 27. The applicant explains his engagement with Medicare and that it was Medicare who told him his visa had been cancelled. (n) 28. The applicant again contacted DOHA, who told him they were unable to tell him anything over the telephone and referred him to their website. (o) 29, 30 and 31. Now extremely concerned and confused about his visa status, the applicant contacted No Borders Migration, having heard a radio advertisement for them. They were able to do a VEVO check, contact DOHA and submit his Subclass 801 visa appeal to the Tribunal on the day of the appeal deadline, 13 April 2018. (p) 32, 33 and 34. The applicant said it was not his intention to avoid the Department's request as he did not even know they were trying to contact him until it was too late; he apologised for his disorganisation and could see (now) that DOHA tried to contact him but reinforced that he had made many attempts to update them with his contact address; and he believed that had he provided the Department with further information at the time they were requesting it, he would have been granted a Permanent 801 visa by now.

27. When questioned on these matters at the Tribunal Hearing, the applicant confirmed the sequence of events described in paragraph 24 above. He told the Hearing that he was computer illiterate, not good with websites and only in 2018 had he been able to do a PDF.
28. The agent's submission continues: This is the crux of the problem – communications with and from DOHA, saying that, as the applicant had lodged his original subclass 820/801 application using paper forms, he has been unable to update any of his details online.
29. It says that the Decision Record gives further credence to the applicant's instructions and declarations to the agent that, when he has spoken to the DOHA, its staff have continued to refer him to their website for instructions as to how to update his details, while also continuing to send him communications to addresses where he has advised them that he and his family no longer reside.
30. The submission says that it can be seen quite clearly that it has been a failure to communicate that has led to the applicant being unaware of the communications being directed to him by post, email and telephone to request further documentation and subsequently being unaware that his Subclass 801 Permanent Partner visa had been refused.
31. The agent submits that the applicant accepts a high degree of responsibility for the fact that one way or the other his updated contact details were not formally communicated to DOHA, but he was certainly not evading DOHA communications and was being proactive in his attempt to ensure that DOHA could contact him when necessary.
32. The Tribunal accepts the veracity and validity of the agent's submission of 30 September 2019, the applicant's Statutory Declaration of 26 September 2019 and his oral evidence to

the Tribunal Hearing on 1 October 2019. Moreover, the Tribunal expresses its concern that, apparently, the Department continued to insist to the applicant that any changes to information had to be lodged electronically, rather than on paper. Given the documented attempts by the applicant to provide updated information to the Department, the Tribunal finds that the Department was negligent in not allowing a person who, on his own admission, was computer illiterate, a means of communication appropriate to his capacity, such as hard copy or telephonic. It finds that the Department should review this aspect of communication with visa applicants and broaden the options available, lest other applicants are disadvantaged by similar circumstances.

### **Whether the parties are in a spouse or de facto relationship**

33. Relevantly to this matter, cl.801.221(2)(c) requires that at the time of this Decision, the applicant is the spouse of the 'sponsoring partner', who must be an Australian citizen or Australian permanent resident or an eligible New Zealand citizen who was specified in the related Subclass 820 visa application as the spouse or de facto partner of the applicant. In the present case the applicant claims to be the spouse of the sponsor who is an Australian citizen and was identified in the Subclass 820 visa application. On the evidence before it, the Tribunal is satisfied that the sponsor is the 'sponsoring partner' of the applicant.
34. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a) - (d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and sponsor's household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in r.1.15A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.
35. In examining the documentary evidence tendered and the oral evidence given by the applicant, sponsor and other witness at the Tribunal Hearing, the Tribunal has considered all aspects of the relationship, as described in paragraph 32 above.

### **Are the parties validly married?**

36. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship. The applicant and sponsor provided to the Tribunal a copy of an extract of an entry in a Register of Marriages for a marriage between them registered in the District of Glasgow, Scotland, United Kingdom, confirming that their marriage was solemnised by authorised celebrant, Registrar Ann Threipland, at the Registration Office, District of Glasgow, on 21 November 2012, in the presence of two witnesses. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

### **Are the other requirements for a spouse relationship met?**

37. *Documentation*
38. In addition to the agent's submission and the Statutory Declaration of the applicant, to both of which reference is made in paragraphs 14 to 29 above, the applicant and sponsor tabled separate, individual Statutory Declarations at the Tribunal Hearing on 1 October 2019. Although executed before their agent, these Statutory Declarations are undated. However, in

the above submission of the agent dated 30 September 2019, in a list of documents provided, reference is made to a Statutory Declaration from the applicant and a Statutory Declaration from the sponsor, yet to be provided. The Tribunal accepts that the two Statutory Declarations tabled at the Hearing are the same as those described in the 30 September 2019 submission and therefore, were executed on either 30 September 2019 or 1 October 2019. These Statutory Declarations provide chronological descriptions of events and activities relevant to the development of the relationship between the applicant and sponsor from 2011 to 2019, together with specific descriptions relevant to the financial aspects of the relationship, the nature of the household, the social aspects of the relationship and the nature of the commitment between the applicant and sponsor.

39. *Financial aspects of the relationship*

40. *Joint ownership of assets:* The applicant and sponsor provided to the Tribunal a copy of an insurance document relating to a 2016 model Ford Ranger Wildtrak motor vehicle insured for \$46,200 or market value, whichever is higher, with RAA Insurance. They provided also a Registration Certificate and for a 2012 Holden sedan in the name of the applicant. However, In their Statutory Declarations described in paragraph 35 above, they claimed that both vehicles are owned jointly. The Tribunal is satisfied that the applicant and sponsor have a modest level of joint ownership of assets.
41. *Joint liabilities:* The applicant and sponsor provided copies of Lease Extension documents in their joint names for a property at Gores Road, Davoren Park, South Australia, for a lease expiring on 9 February 2017, extending it to 1 September 2017, with a further extension to 1 February 2018, a further extension to 1 January 2019 and a further extension to 6 January 2020. They provided also fortnightly receipts in their joint names for payment of rent for this property from 6 January 2019 to 15 September 2019. The Tribunal is satisfied that the liability for rent on this property is a joint liability for the applicant and sponsor. Also provided, was a Tax Invoice/Statement in their joint names from Catherine McAuley School, at Craigmare, South Australia for tuition and related private school fees, dated 12 September 2019. Notwithstanding the evidence in paragraph 40 below that the applicant pays these fees, the Tribunal is satisfied that, legally, this is a joint liability shared by the applicant and sponsor.
42. *Extent of pooling of financial resources:* The applicant and sponsor provided copies of statements for a Bank SA Complete Freedom bank account in the name of the applicant from 11 July 2019 to 10 October 2019; copies of statements for an ANZ Pensioner Advantage bank account in the name of the sponsor from 10 December 2018 to 8 February 2019 and from 10 June 2019 to 9 August 2019; copies of a Bank SA Vertigo Visa credit card statement in the name of the applicant from 8 July 2019 to 6 August 2019. At the Tribunal Hearing, the applicant and sponsor separately reiterated statements in their Statutory Declarations, described in paragraph 35 above, that they had a joint bank account until 2015 with Bank SA but had closed the account because the sponsor was unhappy with the bank's service. The sponsor said she had moved to another bank, which statement is supported by the evidence of her ANZ Bank account, while the applicant said that he continued to bank with Bank SA because he thought the service was decent, because they helped him out with things like downloading a telephone banking app. In their respective Statutory Declarations, described in paragraph 35 above, both the applicant and sponsor claim that they each contribute financially to the running of their home. The Tribunal notes that the individual bank accounts of the applicant and sponsor both show payments reasonably attributable to the day-to-day living expenses of a family. These matters are further explored by the Tribunal in paragraph 40 below. On the evidence described in paragraph 36, 37 and 40, the Tribunal is satisfied that there is some pooling of financial resources between the applicant and sponsor.

43. *Any legal obligations owed to the other party:* The sponsor provided a copy of a Statewide Super document in the name of the sponsor providing Preferred Beneficiary Details, naming the applicant and their daughter, respectively, as each 50 per cent beneficiaries of her superannuation entitlement. The applicant, in his Statutory Declaration, claimed that the sponsor was the beneficiary of his superannuation entitlement but did not provide documentary evidence to confirm this. Nevertheless, the Tribunal accepts his evidence. The Tribunal finds that the applicant and sponsor have legal obligations to each other.
44. *Any sharing of day-to-day household expenses:* As described in paragraph 38 above, the respective bank accounts of the applicant and sponsor show a range of payments reasonably attributable to day-to-day living expenses. In his Statutory Declaration, the applicant said that he pays for the school fees of their daughter Mirrin. At the Tribunal Hearing, he qualified this with the word “mostly.” Reference to the applicant’s Bank SA Vertigo Visa credit card statement confirmed his payment of the school fees for the first part of 2019. At the Tribunal Hearing he said that he and the sponsor share the cost of the daughter’s swimming lessons. However, the Tribunal notes that reference to his Vertigo Visa statement showed a debit for swimming lessons. He said that the sponsor pays for their groceries and reference to her ANZ bank account confirms that she appears to meet the bulk of food expenses. However, the Tribunal notes some supermarket payments appearing also on the applicant’s Bank SA account. The applicant said that he pays the utility bills but that the sponsor makes some contribution, if they receive an unexpectedly large bill on occasions. He said that he and the sponsor share the cost of their daughter’s extracurricular activities and when they go out together, he contributes more as he earns more than the sponsor. At the Tribunal Hearing the applicant said that he pays the rent, in cash, for their residential accommodation and reiterated that he pays the utilities’ bills but the sponsor shares their cost if they are unexpectedly high. He said that the sponsor pays for food, cleaning products, pet food and any veterinarian services required for the pet. The sponsor told the Tribunal Hearing that the applicant pays the rent on the residential property, while she pays for the food and to some extent they share the cost of utilities. On the evidence before it, the Tribunal is satisfied that the applicant and sponsor are sharing of day-to-day household expenses.
45. *Financial aspects conclusion:* The Tribunal places substantial weight on the cumulative evidence in support of the financial aspects of the relationship between the applicant and sponsor as being one exhibiting a mutual commitment to a shared life together to the exclusion of all others, being a genuine and continuing relationship that they living together, or not separately and apart, on a permanent basis.
46. *The nature of the household*
47. *Any joint responsibility for the care and support of children:* According to his original visa application, the applicant has two children from a previous relationship, currently aged 23 and 17 but there is no evidence before the Tribunal of any joint responsibility for those children, nor do the applicant or sponsor claim any such responsibility. However the applicant and sponsor have a daughter, Mirrin, born 13 October 2013 in Australia, for which the Tribunal accepts that they are the father and mother. As described in paragraphs 37 and 40 above, primarily the applicant but to some extent the sponsor, are meeting the education costs of the daughter, while the sponsor is primarily meeting the cost of her food. The applicant said that both he and the sponsor share the responsibility of taking the daughter to school but mostly, he does so because it is easier. He said that they share cooking her favourite foods and generally share responsibilities for the daughter, including taking her to swimming lessons. The sponsor said that they share the responsibilities for their daughter, including taking her to school. She said also that the applicant is a great father, does so much for Mirrin, takes her shopping, to play café’s, to kids’ playgrounds and gyms and to birthday parties. The applicant and sponsor provided to the Tribunal a copy of a letter from



Belinda Bennett, Principal of Catherine McAuley School, dated 14 October 2019, which confirms that Mirrin James is currently enrolled in school and her parents, the applicant and sponsor, are known to the school and both parents participate in Mirrin's care at the school. The letter continues that their participation includes school drop-offs and pickups, early pickup when Mirrin has been unwell, school uniform purchases and general administration enquiries. The Tribunal is satisfied that the applicant and sponsor share the responsibility for the care and support of their six-year-old daughter.

48. *The living arrangements of the applicant/sponsor:* In his Statutory Declaration, the applicant said that, following their marriage in Scotland in November 2012, they moved to Australia in March 2013 and have been living as a married couple thereafter. This was confirmed by the sponsor's Statutory Declaration, which said that they decided to move to Australia because her United Kingdom visa was about to run out and the applicant, her husband, returned to Australia with her on a tourist visa and they arrived 6 March 2013. Along with the applicant, she said that since arriving in Australia, they had lived at her grandparents' address in Scholes Avenue, Parafield Gardens, South Australia, from March to June 2013; at her mother and stepfather's address in Whelstone Court, Salisbury Downs, South Australia, from June to November 2013; at a rented residential property in Tasos Drive, Munno Para West, South Australia, from November 2013 to July 2016; and at a rented residential property in Gores Road, Davoren Park, South Australia, July 2016 to the present. Both the applicant and sponsor said that the only time that they have lived apart during this, now, almost seven year period was for several two week periods during mid-2016, when the applicant first moved into the Davoren Park residence and the sponsor spent some time living at her mother's house, when they were going through a tough time and arguing a bit and didn't want to expose their daughter to these arguments. A range of official documents, including their respective individual bank account statements, confirm Davoren Park as their shared residence. Statutory Declarations from the sponsor's grandfather and stepfather, state that the applicant and sponsor lived together with them at their Parafield Gardens and Salisbury Downs residences, respectively in succession. The Tribunal notes that the Munno Para West residential address was given as the shared residential address of the applicant and sponsor on the applicant's original Subclass 820 visa application. On the evidence before it, the Tribunal is satisfied that the applicant and sponsor have lived together at the above residences since their arrival in Australia.
49. *Any sharing of responsibility for housework:* The applicant said that he tries to clean as best as he can around the home but that the sponsor is very particular about her cleaning and generally cleans up after him. He said that they share the cooking, with him cooking during the week and the sponsor cooking on weekends. He said that he does the dishwashing and they share the gardening but overall they are a team and most household chores are shared between them. The sponsor's evidence was consistent with these claims. The Tribunal is satisfied that the applicant and sponsor share responsibility for housework.
50. *Household aspects conclusion:* The Tribunal gives substantial weight to the cumulative evidence presented regarding the nature of the household as being one which demonstrates the relationship between the applicant and sponsor as being a mutual commitment to a shared life together to the exclusion of all others, being a genuine and continuing relationship that they are living together, or not separately and apart, on a permanent basis.
51. *The social aspects of the relationship*
52. *Whether the persons represent themselves to other people as being married to each other:* The applicant and sponsor provided seven Form 888 Statutory Declarations from friends and family, all dated 23 September 2019. These included new statements from Gregory James Watson, the sponsor's stepfather and Kevin Dowker, the sponsor's grandfather who had provided the only Form 888's in February 2014 in relation to the applicant's Sub class 820

application. The other four new Form 888's were provided by Beverley Dowker , the sponsor's step-grandmother; Amanda Watson, the sponsor's mother; Simon Lee Farrelly and Annmarie Farrelly, friends of the applicant and sponsor; and Tamara Michelle Trebilcock, another friend of the applicant and sponsor. All but one of these Form 888's, being that of Annmarie Farrelly specifically refer to the applicant and sponsor being married, as did the earlier Form 888's of Gregory Watson and Kevin Dowker. Both the applicant and sponsor's Statutory Declarations, described in paragraph 35 above, refer to the marriage and the circumstances leading up to it, as does the applicant's 26 September 2019 Statutory Declaration, although it deals principally with his interaction with the Department. The Tribunal is satisfied that the persons represent themselves to other people as being married to each other.

53. *The opinion of friends and acquaintances about the nature of the relationship:* The two Form 888's provided by the sponsor's stepfather Gregory Watson gives some indication of the development of the relationship between the applicant and sponsor in the years since the applicant's Subclass 820 visa was granted. His Form 888 of February 2014 says, inter-alia, that the applicant and sponsor lived with him and the sponsor's mother for a few months until they got their own house, that they have had a child together, are living together and this is a genuine relationship. His Form 888 of September 2019 says that the applicant and sponsor communicate daily with him and the sponsor's mother, that they visit him and the sponsor's mother weekly, that they are happily married, that it is a strong and genuine relationship and that the applicant is a very good father and husband. Kevin Dowker's Form 888 of February 2014 says, inter-alia, that the applicant and sponsor stayed at his and the sponsor's grandmother's home for several months when they arrived in Adelaide, they now call in weekly, that the relationship is genuine, lasting the test of time and that the applicant is a loving family man. His Form 888 of September 2019 adds that both parents are involved in their daughter's events at her private school and that they are one happy family. The Form 888 of Beverley Dowker says that they have a good marriage, with their daughter their priority, both working hard to ensure they can afford her private schooling, that they are both committed to a good, loving home environment. In her oral evidence at the Tribunal Hearing she said that the applicant is reliable, honest and the first person to offer help. She said that while there were teething problems with the relationship, she attributed that to their arrival and settling into a new country on the part of the applicant and she had never seen them arguing in front of anyone or any displays of anger. She said that they always come to visit together and regularly spend the afternoon with her and the sponsor's step-grandfather. Amanda Watson's Form 888 says that she sees them most days and that the relationship is genuine. Simon Farrelly, a former work mate of the applicant, says they catch up a couple of times a week and do family things together, that the relationship is real because they are always together doing stuff for each other and "Nick Pick" at each other like they married. Annmarie Farrelly says that they catch up weekly as families. Tamara Trebilcock says that she has known the sponsor her entire life through their respective parents' friendship. She says that the applicant and sponsor take their marriage seriously, despite previous ups and downs and are making their marriage work, that she knows that they love each other very much, that they are living a normal married life and that she believes their marriage to be genuine. On the evidence before it, the Tribunal is satisfied that friends and acquaintances regard the relationship between the applicant and sponsor as a genuine and continuing.
54. *Any basis on which the persons plan and undertake joint social activities:* In his Statutory Declaration, the applicant gave a number of examples of shared social activities. He said that each year Christmas and birthdays are celebrated with the sponsor's family, usually at her mother's/stepfather's home. He said that each year they have celebrated their wedding anniversary at a different restaurant in suburban Adelaide. He said that in 2016, 2017 and 2018 they had spent Easter in the Riverland, near Loveday with the Farrelly's. He said that they are involved actively in their daughter's school. The sponsor's Statutory Declaration reiterated these claims. The applicant and sponsor provided several photographs of

themselves involved in social activities with friends and family. The Tribunal is satisfied that the persons plan and undertake joint social activities.

55. *Social aspects conclusion:* The Tribunal gives substantial weight to the cumulative evidence presented regarding the nature of the social aspects of the relationship between the applicant and sponsor as being one which exhibits a mutual commitment to a shared life together to the exclusion of all others, being a genuine and continuing relationship and that they are living together, or not separately and apart, on a permanent basis.
56. *The nature of the persons' commitment to each other*
57. *The duration of the relationship:* The sponsor said that she met the applicant in March 2011 at a pub in Glasgow, Scotland, while she was living in the United Kingdom on a five year ancestry visa. She said that she proposed to the applicant on 29 July 2012, his birthday, after they had been living together for about a year and they were married on 21 November 2012 in Scotland. As described previously in this Decision, she said they returned to Australia on 6 March 2013, had a daughter born 13 October 2013, have been in a continuous relationship in Australia and have lived together, apart from a few weeks in mid-2016, for the entire period since mid-2011. This information was reiterated in the applicant's Statutory Declaration. The Tribunal is satisfied that the applicant and sponsor have been in a relationship since at least mid to late 2011, a period in excess of eight years at the time of this Decision.
58. *The length of time during which the persons have lived together:* On the evidence before it, the Tribunal is satisfied that the applicant and sponsor began living together at least from late 2011. It notes the evidence of the applicant and sponsor that they spent several weeks living apart in 2016 but during that period still spent time together during the day at the newly-rented Davoren Park residence. Even allowing for the period of separation, the Tribunal is satisfied that the applicant and sponsor have lived together for a period of more than eight years at the time of this Decision.
59. *The degree of companionship and emotional support the persons draw from each other:* In his Statutory Declaration, the applicant said that while life since marriage has had challenges, he and the sponsor continue to work on the relationship and that it was important to him to provide support for his wife and daughter. The sponsor said that despite some ups and downs, they work together and resolve any issues because they love each other and their daughter. She said that it was vitally important to her and her family that the sponsor remains in Australia. When asked to comment on this aspect at the Tribunal Hearing, the applicant said that the sponsor always takes care of him when he is sick and they discuss their respective situations at work, particularly any difficulties, as well as issues relating to their daughter's schooling. The sponsor said that the applicant always helps out. The applicant and sponsor provided to the Tribunal copies of affectionate cards they had given to each other on special occasions. The Tribunal is satisfied that the applicant and sponsor provide companionship and emotional support to each other.
60. *Whether the persons see the relationship as a long-term one:* In their respective Statutory Declarations and oral evidence at the Tribunal Hearing, the applicant and sponsor demonstrated that they shared a focus on the future, particularly with regard to providing the best environment in which their daughter could grow up. They both said that they were intent on buying their own house. The applicant said that he was cutting down on other spending, including beer and cigarettes, to enable them to save for a house. The Tribunal is satisfied that the plans for the future indicated by the applicant and sponsor demonstrate that they see their relationship as long-term.

61. *Commitment conclusion:* The Tribunal places substantial weight on the cumulative evidence presented regarding the nature of the persons' commitment to each other as being one where the relationship between the applicant and sponsor exhibits a mutual commitment to a shared life together to the exclusion of all others, being a genuine and continuing relationship and that they have a long-term intent to live together.
62. *Any other relevant considerations*
63. The Tribunal has determined that there are no other relevant considerations.
64. *Summary*
65. In summary, the Tribunal concludes that at the time of visa application and at the time of this Decision, the applicant and sponsor have demonstrated pooling of financial resources and sharing of day-to-day expenses. They have lived together, shared household duties and shared the care for their daughter. They have been in a committed relationship for more than eight years. They provide companionship and emotional support for each other and have demonstrated to the Tribunal continuing plans for their future together.
66. *Overall conclusions*
67. For the above reasons, having carefully considered each of the prescribed factors under s.5F(2)(a–d), the Tribunal is satisfied that, at the time of visa application and at the time of this Decision, the visa applicant and sponsor were in a genuine and continuing relationship and had a mutual commitment to a shared life together to the exclusion of all others and live together, or not separately and apart, on a permanent basis.
68. Given these findings the Tribunal is satisfied that the requirements of s.5F(2) are met at the time of this Decision.
69. Therefore, the applicant meets cl.801.221(2)(c).
70. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 801 visa.

## **DECISION**

71. The Tribunal remits the application for a Partner (Residence) (Class BS) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 801 (Partner) visa:

- cl.801.221 of Schedule 2 to the Regulations

**Grant Chapman**  
**Senior Member**

## ATTACHMENT - Extract from Migration Regulations 1994

### 1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
  - (a) a Partner (Migrant) (Class BC) visa; or
  - (b) a Partner (Provisional) (Class UF) visa; or
  - (c) a Partner (Residence) (Class BS) visa; or
  - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
  - (a) the financial aspects of the relationship, including:
    - (i) any joint ownership of real estate or other major assets; and
    - (ii) any joint liabilities; and
    - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
    - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
    - (v) the basis of any sharing of day to day household expenses; and
  - (b) the nature of the household, including:
    - (i) any joint responsibility for the care and support of children; and
    - (ii) the living arrangements of the persons; and
    - (iii) any sharing of the responsibility for housework; and
  - (c) the social aspects of the relationship, including:
    - (i) whether the persons represent themselves to other people as being married to each other; and
    - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
    - (iii) any basis on which the persons plan and undertake joint social activities; and
  - (d) the nature of the persons' commitment to each other, including:
    - (i) the duration of the relationship; and
    - (ii) the length of time during which the persons have lived together; and
    - (iii) the degree of companionship and emotional support that the persons draw from each other; and
    - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).